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No. 06-778

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IN THE

Supreme Court of the United States

STEPHEN REMY MUELLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION

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In its brief in opposition, the Government cites footnote 3 of *United States v. Granderson*, 511 U.S. 39 (1994): "See . . . *United States v. Granderson*, 511 U.S. 39, 43 n.3 (1994)('The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence.') . . . ." (Br. in Opp'n 7.) In footnote 3 of *Granderson*, the Court cites Senate Report No. 98-225 (1983): "See S. Rep. No. 98-225, p. 88 (1983)." *(Granderson*, 511 U.S. at 43 n.3.) *Senate Report No. 98-225 (1983) draws a clear distinction between an offense for which probation has been expressly precluded, on the one hand, and a statutory minimum sentence, on the other.* On the one hand, it says that "under subsection (a)(2) [of 18 U.S.C. § 3561], probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is *specifically*

precluded." (S. Rep. No. 98-225, at 89 (1983) (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3272.) On the other hand, in a footnote to the statement that "under subsection (a)(2) [of 18 U.S.C. §3561], probation is unavailable to an offender who is convicted of an offense for which the imposition of a sentence of probation is specifically precluded," it says, "The Committee generally looks with disfavor on statutory minimum sentences to imprisonment, since their inflexibility occasionally results in too harsh an application of the law and often results in detrimental circumvention of the laws." (*Id.* at n.194.) Accordingly, it is clear that the offense at bar is not one for which probation is expressly precluded, and the petition for a writ of certiorari should be granted.[1]

Respectfully submitted,

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[1] The Government concedes "that, to the extent that the sentencing guidelines prohibited sentences of probation otherwise authorized by statute, that limitation is no longer mandatory." (Br. in Opp'n 9.)